STATE OF MICHIGAN
IN THE SUPREME COURT

LAWRENCE T. CURTIS,

Plaintiff-Appellee,

v

CITY OF DETROIT,

Defendant-Appellant.
_____/

Supreme Court No. 125652

Court of Appeals No. 241632

Wayne County Circuit Court
No. 00-032355 CH

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DEFENDANT-APPELLANT'S REPLY BRIEF IN SUPPORT OF ITS APPLICATION FOR LEAVE TO APPEAL

125652
reply

EXHIBITS A-C

PROOF OF SERVICE

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I. THE CITY OF DETROIT COMPLIED WITH ALL LEGAL REQUIREMENTS REGARDING NOTICE TO THE OWNER OF RECORD.

A. Pohutski v Allen Park is irrelevant to the instant case since Plaintiff did not plead a trespass-nuisance under Hadfield, but rather tort claims for which the City is immune.

Plaintiff-Appellee asserts that the recent case of Pohutski v Allen Park, 465 Mich 675; 641 NW2d 219 (2002) supports his claim for damages, since its holding does not apply to his action. Plaintiff-Appellee's Response to Application for Leave to Appeal at 11-13. In Pohutski, the Michigan Supreme Court overruled Hadfield v Oakland Co Drain Comm'r, 430 Mich 139; 422 NW2d 205 (1988) and held that the plain language of MCL 691.1407 does not permit a "trespass-nuisance" exception to the **governmental** immunity of lower governmental agencies such as cities. In doing so it stated:

> When parsing a statute, we presume every word is used for a purpose. As far as possible, we give effect to every clause and sentence. "The Court may not assume that the Legislature inadvertently made use of one word or phrase instead of another." Robinson v Detroit, 462 Mich 439, 459; 613 NW2d 307 (2000). Similarly, we should take care to avoid a construction that renders any part of the statute surplusage or nugatory. In re MCI, supra at 414.
>
> With these principles of statutory construction in mind, we turn to the language of MCL 691.1407(1), which provides:
>
> > Except as otherwise provided in this act, a *governmental agency* is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this act, this act does not modify or restrict the immunity of the *state* from tort liability as it existed before July 1, 1965, which immunity is affirmed. [Emphasis added.]

"Governmental agency" and "state" are not synonymous, nor are they

interchangeable. Rather, each is precisely defined in the statute:

> (b) "Political subdivision" means a municipal corporation, county, county road commission, school district, community college district, port district, metropolitan district, or transportation authority or a combination of 2 or more of these when acting jointly; a district or authority authorized by law or formed by 1 or more political subdivisions; or an agency, department, court, board, or council of a political subdivision.
>
> (c) "State" means the State of Michigan and its agencies, departments, commissions, courts, boards, councils, and statutorily created task forces and includes every public university and college of the state, whether established as a constitutional corporation or otherwise.
>
> (d) "Governmental agency" means the state or a political subdivision. [MCL 691.1401.]

Under a plain reading of the statute, then, the first sentence of § 7 applies to both municipal corporations and the state, while the second sentence applies only to the state. Despite the Legislature's clear and unambiguous use of the word "state" in the second sentence, this Court has struggled with its meaning.

***

Hadfield went astray, however, in interpreting the second sentence of § 7. Ignoring the second sentence's express application only to the "state," the Hadfield Court held that "the second sentence of § 7 retains preexisting *governmental* immunity law except where provided otherwise in the act" and concluded that it required "a continuation of the nuisance exception as formulated prior to the enactment of the governmental immunity act in 1964, as amended by 1970 PA 155." *Id.* at 147-149 (emphasis added).

Pohutski, 465 Mich at 683-686. As a result, the Pohutski Court held that there was no "trespass-nuisance" exception to the **governmental** immunity of municipal corporations such as the City of Detroit, pursuant to the first sentence of MCL 691.1407(1), since it is not one of the exceptions provided in the statute. 465 Mich at 689-690.

The Pohutski Court also held, however, that its ruling would apply only to cases brought on

or after April 2, 2002. 465 Mich at 699. Therefore, as Plaintiff points out, the holding does not apply to the case at bar. But this does not help Plaintiff's argument because he never pled a trespass-nuisance under Hadfield, supra. Count III of his Complaint (Exhibit A) alleges a simple common-law trespass which, as Defendant has pointed out, is an intentional tort for which Defendant enjoys governmental immunity.

Plaintiff is also incorrect when he asserts that "[t]he Court in Pohutski did not rule on the argument that the Plaintiff's claim was one for trespass based on an unconstitutional taking of property, instead remanding it to the trial court for review of that argument." Plaintiff-Appellee's Response to Application for Leave to Appeal at 11-12. What the Court actually said is:

> The parties have addressed whether trespass nuisance is not a tort within the meaning of the governmental immunity statute, but rather an unconstitutional taking of property that violates Const 1963, art 10, § 2. The trial courts in these cases have yet to address the taking claims. Therefore, we decline to discuss those claims at this time.

Pohutski, supra, 465 Mich at 699. Therefore, what the Court declined to address was a claim for a "taking" in violation of the Michigan Constitution, **not** whether trespass is a constitutional violation. Again, this does not help Plaintiff since he never pled a violation of the Michigan Constitution. He did initially allege a federal constitutional claim under 42 USC 1983 (see Complaint - Exhibit A, Count I), but voluntarily dismissed this count via stipulated Order on November 9, 2000. See Exhibit B. Therefore, there were no constitutional issues involved in this case, simply the tort claims of trespass and gross negligence as Defendant has noted and for which the City of Detroit enjoys governmental immunity.

Further, what the Pohutski Court remanded to the circuit courts for was reconsideration of defendants' motions for summary disposition under Hadfield. 465 Mich at 700. This does not help

Plaintiff either, since he has never pled a Hadfield claim.

On page 12 of his Response, Plaintiff cites Footnote 10 in Li v Feldt, 434 Mich 584, 594 n 10; 456 NW2d 55 (1990) for the proposition that "[t]respass is based on the Taking Clause of the Michigan Constitution, Article 10, Section 2, and, as a consequence, governmental immunity is not a defense." Plaintiff-Appellee's Response to Application for Leave to Appeal at 12. This is inaccurate. What the footnote actually states, in pertinent part, is that "[t]he Taking Clause of the constitution rests at the foundation of the **trespass-nuisance exception**." (Emphasis added.) This statement was in conjunction with the Court's noting that **trespass-nuisance** was a clearly recognized exception prior to July 1, 1965, and the only common-law one specifically acknowledged by the plurality in Hadfield. 434 Mich at 594. Again, Plaintiff in the instant case never pled a trespass-nuisance under Hadfield, and is attempting to confuse a trespass-nuisance or taking claim with the simple trespass claim he pled.

In any event, in Jones v Powell, 462 Mich 329; 612 NW2d 423 (2000), the Supreme Court declined to infer an action for damages for violation of the Michigan Constitution against a municipality or an individual government employee, stating:

> The plaintiff brought this action against individual police officers, seeking damages on various theories arising out of their forced entry into her home in search of a suspect. Some claims were dismissed, and the jury found for the defendants on others. However, it found in plaintiff's favor on her claim that the actions of one officer violated her and her daughter's rights under the Michigan Constitution. The Court of Appeals reversed, with the majority basing its decision on the conclusion that the plaintiff had not established that the defendant officer's actions were undertaken pursuant to a custom, policy, or practice of the Detroit Police Department.
>
> We agree with the result reached by the Court of Appeals, though not with the rationale. **Rather, we conclude that there is no judicially inferred cause of action under circumstances like those presented in this case.** Therefore, we affirm the judgment of the Court of Appeals.

***

We agree with the Court of Appeals majority that our decision in Smith [v Dep't of Public Health, 428 Mich 540; 410 NW2d 749 (1987), aff'd sub nom Will v Dep't of State Police, 491 US 58; 109 S Ct 2304; 105 L Ed 2d 45 (1989)] provides no support for inferring a damage remedy for a violation of the Michigan Constitution in an action against a municipality or an individual government employee. In Smith, our consideration of the issue focused on whether such a remedy should be inferred against the state, which is not subject to liability under 42 USC 1983.

***

Smith only recognized a narrow remedy against the state on the basis of the unavailability of any other remedy. Those concerns are inapplicable in actions against a municipality or an individual defendant. Unlike states and state officials sued in an official capacity, municipalities are not protected by the Eleventh Amendment. Lake Country Estates, supra at 400-401. A plaintiff may sue a municipality in federal or state court under 42 USC 1983 to redress a violation of a federal constitutional right. Monell, supra at 690, n 54 and accompanying text. Further, a plaintiff may bring an action against an individual defendant under Sec. 1983 and common-law tort theories.

Accordingly, pursuant to MCR 7.302(F)(1), in lieu of granting leave to appeal, we affirm the judgment of the Court of Appeals.

462 Mich at 330-331, 335-337 (Emphasis added).

The case at bar is directly on point to Jones. Plaintiff had the alternative remedy of a federal constitutional action, but declined to pursue it. Thus, he has no claim under the Michigan Constitution. The dismissal of the constitutional claim further demonstrates that Plaintiff's remaining claims were based in tort only; therefore, the judgment should be reversed since Defendant City is immune as a matter of law. Notably, Plaintiff has never challenged the State statutes or City ordinances relative to demolition as being violative of due process, either facially or as applied.

Consequently, the City is governmentally immune as to Plaintiff's claim for common law

trespass (Count III of the Complaint - Exhibit A), and the City was entitled to judgment as a matter of law. As a result, this Court should reverse.

B. The City provided all required notice pursuant to statute and ordinance.

Therefore, in the absence of a constitutional claim, the fundamental issue in this case is whether the City complied with State law (the minimum standard) and its own ordinances (which provide higher requirements than the State standard). The City did comply with all relevant statutes and ordinances in this case.

Since the City did not convey title to Ms. Hoyle via quitclaim deed until August 29, 1994 (see Exhibit C), under the ordinance only the Community and Economic Development Department would have been entitled to notice as of June 7, 1994 as the City was still the owner of record on that date. The notice to Ms. Hoyle as well, on Three Mile Drive (see Exhibit B to Defendant's Application) was part, along with the Lis Pendens, of the City's effort to give notice to all persons with an interest in the property, since City Council had approved the sale to her on March 23, 1994 (see id). In any event, it is indisputable that Ms. Hoyle had actual notice of the demolition proceedings since she came into the Buildings and Safety Engineering offices, and sought deferral of the demolition twice. See Exhibits D and E to Defendant-Appellant's Application for Leave to Appeal.

In short, the City complied with all the pertinent statutes and ordinances; they simply do not require what Plaintiff seeks to have this Court require. As a result, the Court should reverse the judgment herein.

C. Geftos v Lincoln Park is distinguishable from the case at bar.

Plaintiff-Appellee further argues that Geftos v Lincoln Park, 39 Mich App 644; 198 NW2d 169 (1972) "is binding precedent." Plaintiff-Appellee's Response to Application for Leave to Appeal at 5. In Geftos the Lincoln Park City Council declared the property in question a nuisance on three separate occasions - on July 26, 1965, August 15, 1966 and February 6, 1967. During August 1966 Geftos entered into negotiations with the then owner to purchase the property, but prior to consummating the purchase learned of the condemnation. After determining that repairs were feasible, he acquired title on September 22, 1996, and the council deferred demolition at his request. He also was in contact with city officials regarding the repairs, and in fact made a number of repairs.

On February 6, 1967, Geftos attended his fifth City Council meeting, at which the council renewed its determination that the property was a nuisance, since the basic defects had not been repaired nor were they proposed to be repaired. It ordered demolition on or after March 9, 1967, if plaintiff had not abated or removed it by that time. The demolition occurred on March 10, 1967.

On pages 5 and 6 of his Response Plaintiff Curtis selectively quotes from a lengthy paragraph in the Geftos opinion. The complete paragraph reads as follows:

> Nor can it be successfully argued that because the city had, on August 15, 1966 (being prior to the time plaintiff took ownership of the premises), declared the home to be a nuisance and ordered its demolition within 30 days, plaintiff was not entitled to any additional notice and hearing regarding the renewal of these determinations, he having been apprised of the city's actions prior to the time he took ownership. It is clear from the record that the city assented to the subject home being repaired or rehabilitated and even encouraged plaintiff to do so. Consequently, plaintiff did, in fact, take steps to repair the premises and expended considerable time and moneys for that purpose, all with the knowledge of the city, its agents, and employees. Additionally, the city did in fact hold up the contemplated demolition at plaintiff's request. Because of the foregoing, we hold that the city is now estopped from acting under the council resolution of August 15, 1966, with regard to the plaintiff. In light of the above we conclude that in the demolition of plaintiff's house

there occurred a taking of property without due process of law.

Geftos, 39 Mich App at 655. This paragraph demonstrates that the facts at bar are not "... even more compelling than Geftos" (Plaintiff-Appellee's Response to Application for Leave to Appeal at 6), but indeed very distinguishable. In the case at bar, at no time did the City of Detroit assent to any repairs on the property; in fact, City Council denied two requests for deferral from the prior owner, Barbara Hoyle. Plaintiff Curtis claimed that he made repairs, but the City of Detroit had no knowledge of this, unlike the city in Geftos. In fact, it is undisputed that there were no permits for the repairs Mr. Curtis alleges he made, so there was no notice to the City of Detroit that any work was being done to this property. TR 3/7/02 at 111 (Exhibit N to Defendant-Appellant's Application).

At bottom, the holding in Geftos is that the city's knowledge estopped it from invoking the prior demolition resolution. In the case at bar, the City of Detroit had no knowledge of (and did not assent to) Plaintiff's repairs, and Plaintiff did not rely on any statements or assurances from the City. Consequently, estoppel does not apply.

Further, Geftos involved a claim of taking without due process of law, whereas the instant case involves a simple tort claim of trespass. For these reasons, Geftos is in no way applicable to the case at bar, and this Court should reverse the circuit court's judgment.

II. DEFENDANT CITY DID NOT "WAIVE" ITS ALTERNATIVE ARGUMENT THAT A REMAND IS NECESSARY TO DETERMINE WHETHER PLAINTIFF WAS A "BONA FIDE PURCHASER FOR VALUE" WHO WAS NOT ENTITLED TO CONSTRUCTIVE NOTICE VIA A CURRENT LIS PENDENS.

In Section I D of his Argument Plaintiff contends that Defendant has "waived" its argument that since the circuit court apparently (and the Court of Appeals explicitly) assumed that Plaintiff Curtis was a bona fide purchaser for value, although this issue was neither presented nor decided by either court below, at a minimum a remand to the circuit court is necessary to decide this issue and what, if any, notice Plaintiff was entitled to. Contrary to Plaintiff's assertion, there was never any argument from Plaintiff below that he was a bona fide purchaser, which the City failed to contest. The issue was whether a current Lis Pendens was required to give notice to subsequent purchasers of the property, not whether Plaintiff was a "BFP" and therefore entitled to notice via a current Lis Pendens. It is the Court of Appeals opinion which raised this issue for the first time, stating that "[i]f defendant had complied with the lis pendens statute, a subsequent bona fide purchaser for value such as plaintiff would have acquired the property subject to the order of demolition." Slip op at 2 (Exhibit S to Defendant's Application). For this reason, Defendant alternatively seeks a remand.

Plaintiff's Affidavit which he references (part of Exhibit E to his Response) does not establish that this was the issue below; all it states is that he never received any notification from the City of Detroit that the property was slated for demolition. As noted in Defendant's Application, "bona fide purchaser for value" is a specific legal status, dependent on whether a purchaser had notice of facts that would lead a reasonable person to make further inquiry. Royce v Duthler, 209 Mich App 682, 690; 531 NW2d 817 (1995). As Defendant has also pointed out, there is evidence in the record from which the trial court could conclude that Plaintiff Curtis was not a bona fide

purchaser for value, and consequently not entitled to the constructive notice of a current Lis Pendens.

RELIEF REQUESTED

For all of the above reasons, and those previously stated, Defendant-Appellant City of Detroit respectfully requests that this Honorable Court grant leave to appeal, reverse the decision of the Court of Appeals in all respects except the vacation of $2,000.00 in property taxes (found in Part IV), and grant judgment to Defendant City; or in the alternative reverse and remand for further proceedings.

Respectfully submitted,

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